



Rule and Interpretive/Policy Statement Review Checklist
(This form must be filled out electronically.)

This form is to be used when the current version of the rule(s) has/have not previously been reviewed. When reviewing an interpretive or policy statement, this document is to be used only if the review of the statement is not in conjunction with the review of a rule.

All responses should be **bolded**.

Document(s) Reviewed (include title): **WAC 458-20-128, Real estate brokers and salesmen.**

Date last adopted/issued: **3/15/1983**

Reviewer: **PAT MOSES**

Date review completed: **10/16/2002**

Briefly explain the subject matter of the document(s):

- **Rule 128 explains the taxability of commission income and other fees received by real estate brokers and salespersons. The rule discusses several commission or fee arrangements commonly experienced by brokerage offices, as well as other associated brokers or salespersons.**

Type an "X" in the column that most correctly answers the question, and provide clear, concise, and complete explanations where needed.

1. Public requests for review:

YES	NO	
	X	Is this document being reviewed at this time because of a public (e.g., taxpayer or business association) request?

If "yes," provide the name of the taxpayer/business association and a brief explanation of the issues raised in the request.

2. Need:

YES	NO	
X		Is the document necessary to comply with the statutes that authorize it? (E.g., Is it necessary to comply with or clarify the application of the statutes that are being implemented? Does it provide detailed information not found in the statutes?)
	X	Is the information provided in the document so obsolete that it is of little value, warranting the repeal or revision of the document?
	X	Have the laws changed so that the document should be revised or repealed? (If the response is "yes" that the document should be repealed, explain and identify the statutes the rule implemented, and skip to Section 10.)



X	Is the document necessary to protect or safeguard the health, welfare (budget levels necessary to provide services to the citizens of the state of Washington), or safety of Washington's citizens? (If the response is "no", the recommendation must be to repeal the document.)
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Please explain.

- **Rule 128 discusses the application of B&O tax on real estate commissions or fees and provides instruction for several specific commission or fee arrangements, so that both taxpayers and agency staff can determine the appropriate amount of tax due. In this manner the rule promotes consistency and a higher degree of voluntary compliance with the tax.**

3. Related interpretive/policy statements, court decisions, BTA decisions, and WTDs:

Complete Subsection (a) only if reviewing a rule. Subsection (b) should be completed only if the subject of the review is an interpretive or policy statement. Excise Tax Advisories (ETAs), Property Tax Advisories and Bulletins (PTAs/PTBs), and Interim Audit Guidelines (IAGs) are considered interpretive and/or policy statements.

(a)

YES	NO	
X		Are there any interpretive or policy statements that should be incorporated into this rule? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
	X	Are there any interpretive or policy statements that should be cancelled because the information is currently included in this or another rule, or the information is incorrect or not needed? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
	X	Are there any Board of Tax Appeals (BTA) decisions, court decisions, or Attorney General Opinions (AGOs) that provide information that should be incorporated into this rule?
X		Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) that provide information that should be incorporated into the rule?

(b)

YES	NO	
		Should this interpretive or policy statement be incorporated into a rule?
		Are there any Board of Tax Appeals (BTA) decisions, court decisions, or Attorney General Opinions (AGOs) that affect the information now provided in this document?
		Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) that provide information that should be incorporated into the document?



If the answer is “yes” to any of the questions in (a) or (b) above, identify the pertinent document(s) and provide a brief summary of the information that should be incorporated into the document.

- **Refer to prior review of this rule, dated 4/1/1999, for comments on ancillary document ETA 563 (Real estate brokers—Shared commissions and expenses).**

4. Clarity and Effectiveness:

YES	NO	
X		Is the document written and organized in a clear and concise manner?
X		Are citations to other rules, laws, or other authority accurate? (If no, identify the incorrect citation below and provide the correct citation.)
X		Is the document providing the result(s) that it was originally designed to achieve? (E.g., does it reduce the need for taxpayers to search multiple rules or statutes to determine their tax-reporting responsibilities or help ensure that the tax law and/or exemptions are consistently applied?)
	X	Do changes in industry practices warrant repealing or revising this document?
	X	Do administrative changes within the Department warrant repealing or revising this document?

Please explain.

- **This rule is relied upon by taxpayers and departmental staff to determine taxability and to promote consistency. A review of administrative decisions (WTD’s) relating to this rule indicates that the rule is reasonable, clear, and to the point. However, as indicated in the prior review of this rule, additional information exists that could be incorporated into the rule in some future revision, making it even more effective. At that time, the rule can also be reformatted and made less gender specific.**

5. Intent and Statutory Authority:

YES	NO	
X		Does the Department have sufficient authority to adopt this document? (Cite the statutory authority in the explanation below.)
X		Is the document consistent with the legislative intent of the statute(s) that authorize it? (I.e., is the information provided in the document consistent with the statute(s) that it was designed to implement ?) If “no,” identify the specific statute and explain below. List all statutes being implemented in Section 9, below.)
	X	Is there a need to recommend legislative changes to the statute(s) being implemented by this document?

Please explain.

- **The department’s authority to make and publish rules is contained in RCW 82.01.060(2) and RCW 82.32.300.**



6. Coordination: Agencies should consult with and coordinate with other governmental entities that have similar regulatory requirements when it is likely that coordination can reduce duplication and inconsistency.

YES	NO	
	X	Could consultation and coordination with other governmental entities and/or state agencies eliminate or reduce duplication and inconsistency?

Please explain.

- **The business and occupation tax as discussed in Rule 128 is reported on the combined excise tax return and is the specific domain of the Department of Revenue.**

7. Cost: When responding, consider only the costs imposed by the document being reviewed and not by the statute.

YES	NO	
	X	Have the qualitative and quantitative benefits of the document been considered in relation to its costs? (Answer “yes” only if a Cost Benefit Analysis was completed when the rule was last adopted or revised.)

Please explain.

- **This is an interpretive rule that imposes no new or additional administrative burdens on businesses that are not already imposed by the law.**

8. Fairness: When responding, consider only the impacts imposed by the document being reviewed and not by the statute.

YES	NO	
X		Does the document result in equitable treatment of those required to comply with it?
	X	Should it be modified to eliminate or minimize any disproportionate impacts on the regulated community?
	X	Should the document be strengthened to provide additional protection to correct any disproportionate impact on any particular segment of the regulated community?

Please explain.

- **This rule aids taxpayers by giving specific instructions and examples. This helps assure that taxpayers can self determine their specific liabilities. The rule also promotes consistent and fair application of the related statutes on the part of DOR staff.**



9. LISTING OF DOCUMENTS REVIEWED: Use “bullets” with any lists, and include documents discussed above. Citations to statutes, interpretive or policy statements, and similar documents should include titles. Citations to Attorney General Opinions (AGOs) and court, Board of Tax Appeals (BTA), and Appeals Division (WTD) decisions should be followed by a brief description (i.e., a phrase or sentence) of the pertinent issue(s).

Statute(s) Implemented: **No additional implementing statutes since this rule’s last review in 1999.**

Interpretive and/or Policy Statements (e.g., ETAs, PTAs, IAGs): **No new ancillary interpretive and or policy documents since this rule’s last review in 1999.**

Court Decisions:

- **DAVENPORT, INC v. DEP’T OF REV.** 581, 6Wn. App. 581, 494P.2d 1376 [No. 388-2. Division Two. March 16, 1972.] – A real estate brokerage office having a broker and associate brokers within the same office as independent contractors is “a group of individuals acting as a unit” as that phrase is used in RCW 82.04.030 to define “persons” taxable under RCW 82.04.220 for the privilege of engaging in business activities.

Board of Tax Appeals Decisions (BTAs):

- **BTA docket #80-26, FAO SALES VS. STATE OF WASHINGTON, DEPARTMENT OF REVENUE** – A real estate brokerage office arranged with associate agents for payment of fixed monthly amounts rather than splitting of commissions. Payment entitled associates to exclusive office space in the brokerage’s building. The agents had a choice of paying a flat rate per month in lieu of rent or could choose compensation on a commission per sale. The taxpayer argued that this arrangement was merely a method for dividing real estate commissions between the brokerage office and the associates. The BTA found for DOR in that the payments to the brokerage were in return for providing agents with license to use realty and was taxable under the Service Business Tax classification.

Appeal Division Decisions (WTDs):

- **19 WTD 385 (2000)** – A real estate commission paid by a homebuyer to a real estate broker employed by the contractor/seller is included in the full contract price of the house, and seller is liable for retail sales tax and retailing B&O tax on the commission amount unless the seller can show it was not obligated to pay the commission.
- **20 WTD 500 (2001)** – Amounts earned by a real estate broker from real estate associates for use of the broker’s offices, equipment, and services are subject to the B&O tax rate specifically applicable to real estate brokers rather than the tax rate on royalties earned from granting intangible rights (franchise fee).

Attorney General Opinions (AGOs): **None**

Other Documents (e.g., special notices or Tax Topic articles, statutes or regulations administered by other agencies or government entities, statutes, rules, or other documents that were reviewed but were not specifically relevant to the subject matter of the document being reviewed): **None**



10. Review Recommendation:

- _____ **Amend**
- _____ **Repeal/Cancel** (Appropriate when action is not conditioned upon another rule-making action or issuance of an interpretive or policy statement.)
- X** **Leave as is** (Appropriate even if the recommendation is to incorporate the current information into another rule.)
- _____ **Begin the rule-making process for possible revision.** (Applies only when the Department has received a petition to revise a rule.)

Explanation of recommendation: Provide a brief summary of your recommendation. If recommending that the rule be amended, be sure to note whether the basis for the recommendation is to:

- Correct inaccurate tax-reporting information now found in the current rule;
 - Incorporate legislation;
 - Consolidate information now available in other documents (e.g., ETAs, WTDs, and court decisions); or
 - Address issues not otherwise addressed in other documents (e.g., ETAs, WTDs, and court decisions).
- **The rule is correct as is. While there is no need to revise the rule at this time, information now provided in ETA 563 should be included in the rule at its next revision, at which time gender specific terminology used in the rule may be replaced.**

11. Manager action: Date: _____

_____ Reviewed and accepted recommendation

Amendment priority:

- _____ 1
_____ 2
_____ 3
_____ 4